

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TERESA FOX,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

) Case No. DISM-02-0023

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on April 1, 2003 and April 2, 2003.

1.2 **Appearances.** Appellant Teresa Fox was present and was represented by James Keech, Attorney at Law. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, malfeasance, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleges that Appellant drank alcohol and smoked marijuana during work hours while attending a conference.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Harper v. WSU, PAB No. RULE-00-0040 (2002); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992); Aquino v. University of Washington, PAB No. D93-163 (1995).

## II. FINDINGS OF FACT

2.1 Appellant was a permanent employee of Respondent Department of Social and Health Services (DSHS) with the Division of Child Care and Early Learning (DCCEL). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 14, 2002.

2.2 Appellant began her employment with the Department of Social and Health Services on July 1, 1997. At the time of her dismissal, Appellant was a Social Worker 3 with the DCCCEL at the Region 5 Tacoma Office. Appellant licensed child care homes. Appellant evaluated whether the homes met safety and health standards, worked with Child Protective Services social workers during investigations, trained and orientated new child care home providers, investigated licensing complaints, and conducted on-going site visits to monitor the child care homes.

2.3 By letter dated March 5, 2002, Rachael Langen, Director of DCCCEL, informed Appellant of her dismissal effective March 21, 2002. Ms. Langen charged Appellant with neglect of duty, inefficiency, malfeasance, gross misconduct, and willful violation of published employing agency

1 policies. Ms. Langen alleged that Appellant drank alcohol and smoked marijuana during work  
2 hours from 8:00 a.m. to 5:00 p.m. on October 11, 2001 while attending a DCCEL Conference at the  
3 Silverdale Hotel in Silverdale, Washington.

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5 2.4 Appellant has not been the subject of prior formal disciplinary actions. However, Barbara  
6 Stone had concerns about Appellant consuming alcohol during work hours. Subsequently,  
7 Appellant and the agency entered into a Contract in Lieu of Disciplinary Action on July 28, 1999  
8 and a Return to Work Agreement on October 21, 1999. These signed documents, in part, stated that  
9 Appellant:

- 10 • Should participate in a structured outpatient chemical dependence program.
- 11 • Would continue receiving therapeutic assistance from a PhD.
- 12 • Would benefit from participation in a structured anger management program.
- 13 • Would not drink alcohol or use other mind-altering drugs as long as under supervision of  
14 EAS.
- 15 • Would continue to meet with an EAS counselor.
- 16 • Attend therapy sessions to address anger issues and attend self-help groups.
- 17 • Submit to random alcohol tests.

18 The contract specifically stated that the terms of the agreement would:

19 ...enable [Appellant] to return to her position as a Family Childcare Licensor at the Office  
20 of Childcare Policy in a way that does not compromise the safety and professional work  
21 environment of her work unit or the office. Based on [Appellant's] acknowledgement of  
22 problems, this agreement takes into account the impact of [Appellant's] past behavior on her  
23 work unit environment and the fact that she is working with Employee Advisory Services.

24 2.5 When the contract and agreement were signed, the appointing authority at that time, Barbara  
25 Stone, informed Appellant that she would be terminated if she failed to meet these standards in the  
26 future. Appellant testified that she did not remember Ms. Stone's warning. However, Ms. Stone  
reported the warning of termination to the current appointing authority, Ms. Langen. Further, Laura

1 Dallison, Field Operations Administrator, witnessed Ms. Stone warning Appellant. Therefore, it is  
2 more probable than not that Appellant received notice that further misconduct could result in  
3 termination.

4  
5 2.6 On October 11, 2001, DSHS sponsored a DCCEL conference. Appellant was scheduled to  
6 attend, and she was on pay status while she attended the conference. Appellant had a duty to be in  
7 attendance at the DCCEL Conference during her work hours from 8:00 a.m. to 5:00 p.m.

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9 2.7 The facts of what occurred during the October 11, 2001 DCCEL Conference are not in  
10 dispute. Appellant admits that she purchased and brought Seagrams whiskey and marijuana to the  
11 conference with her. Sometime between 11:30 a.m. and 11:45 a.m., Appellant and a co-worker  
12 drove a few blocks from the conference and parked in a lot to drink whiskey and smoke marijuana.

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14 2.8 Sometime between 1:30 p.m. and 2:00 p.m., Appellant returned to the conference to attend a  
15 1:30 workshop session. At approximately 2:30 p.m., Appellant left the workshop. Appellant went  
16 to her hotel room with a co-worker where they consumed whiskey and smoked marijuana until  
17 approximately 4:15 p.m.

18  
19 2.9 At approximately 4:30 p.m., Appellant's co-workers saw her in the lobby. Appellant was  
20 staggering, talking loudly, and obviously intoxicated. When the co-workers saw Appellant's  
21 condition, they began to try and assist her rather than continue participating in the conference.

22  
23 2.10 Shortly before 5:00 p.m., Linda Kalinowski, Regional Manager, saw Appellant in the hotel  
24 lobby. Ms. Kalinowski realized that Appellant was obviously intoxicated. Ms. Kalinowski took  
25 Appellant outside to talk to her and could smell liquor on her breath. Ms. Kalinowski asked  
26

1 Appellant if she had been drinking. Appellant wanted to know if it was 5:00 p.m. yet, and then  
2 stated, "I've been busted."

3  
4 2.11 The following morning, Ms. Kalinowski and Mary Kay Quinlan, Appellant's supervisor,  
5 met with Appellant in her hotel room and informed her that she was being placed on home  
6 assignment pending an investigation.

7  
8 2.12 The Department of Social and Health Services' Personnel Policy 550, "Alcohol and Drug  
9 Free Workplace," states in part:

10  
11 "... Employees must ... not be under the influence of alcohol or drug(s) when they report  
12 for duty; are on duty; return to duty from breaks, meal times or time off ... not unlawfully  
13 possess ... use ... alcohol, drugs, or drug paraphernalia, while: on official business ... not  
14 use drugs likely to adversely affect work performance, behavior, or safety ..."

15 2.13 The Department of Social and Health Services Policy 6.04, "Standards of Ethical Conduct  
16 for Employees," requires employees to:

17 "... perform duties and responsibilities in a manner that maintains standards of behavior that  
18 promote public trust, faith and confidence. Specifically, employees shall: [s]trengthen  
19 public confidence in the integrity of state government by demonstrating the highest  
20 standards of personal integrity ... compliance with laws, rules, and departmental policies."

21 2.14 By signature dated July 1, 1997, Appellant acknowledged that she read and/or received a  
22 copy of the agency's Alcohol and Drug Free Workplace Policy 550 and Standards for Ethical  
23 Conduct for Employees Policy 6.04.

1 2.15 To determine whether misconduct occurred, Ms. Langen reviewed the Conduct  
2 Investigation Report. Ms. Langen also considered Appellant's responses to the allegations at the  
3 fact-finding meeting and the pre-termination review.

4  
5 2.16 Ms. Langen considered the serious nature of Appellant's behavior in spite of the previous  
6 warning from Barbara Stone. Ms. Langen determined that even though Appellant had been given  
7 an opportunity to correct her behavior, she chose to drink alcohol and use drugs during work hours  
8 on the day of the conference. Ms. Langen was concerned about Appellant's possession and use of  
9 marijuana. Ms. Langen decided that Appellant failed to demonstrate the level of professional  
10 judgment required by a Social Worker 3.

11  
12 2.17 Ms. Langen determined that Appellant clearly engaged in misconduct, and that Appellant's  
13 behavior constituted neglect of duty, inefficiency, malfeasance, gross misconduct, and willful  
14 violation of agency policies.

15  
16 2.18 In determining the level of discipline, Ms. Langen reviewed Appellant's personnel file, the  
17 Contract in Lieu of Disciplinary Action, and the Return to Work Agreement. Ms. Langen  
18 determined that substantial disciplinary action was necessary. Ms. Langen briefly considered  
19 placing Appellant in a position that did not require driving or interacting with the public to prevent  
20 the risk of Appellant drinking and visiting a client. However, there were no positions available.  
21 Ms. Langen concluded that termination was the appropriate sanction based on Appellant's history.

### 22 23 **III. ARGUMENTS OF THE PARTIES**

24 3.1 Respondent argues that Appellant brought marijuana and alcohol to a work-sponsored  
25 conference which violated agency policy as well as the law. Respondent acknowledges that  
26 Appellant was a good social worker, but Appellant was on notice that she would be terminated for

1 any future alcohol problems that impacted her at work. Respondent contends that Appellant's  
2 behavior was very disruptive to the conference and interfered with some of her co-workers' ability  
3 to participate in the conference. Respondent argues that Appellant's behavior was clearly  
4 egregious, flagrant, and highly visible in a public place. Respondent asserts that the sanction of  
5 dismissal was appropriate based on Appellant's history.

6  
7 3.2 Appellant argues that Respondent's claim that she was intoxicated while "on duty" is  
8 tenuous. Appellant asserts that the conference was located away from her home office, therefore,  
9 she was not at work at the time, and she contends there was no "dry rule" in effect at the  
10 conference. Appellant argues that she has completed an intensive alcohol treatment program and  
11 has remained alcohol and drug free for a year and a half. Appellant asserts that she performed her  
12 Social Worker 3 job well, and she contends that the penalty for missing an afternoon of work should  
13 not be dismissal. Appellant asks the Board to reverse her dismissal and demote her instead to the  
14 Social Worker 1 job classification.

#### 15 16 IV. CONCLUSIONS OF LAW

17 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.

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19 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
20 the charges upon which the action was initiated by proving by a preponderance of the credible  
21 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
22 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
23 Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
3 of Social & Health Services, PAB No. D86-119 (1987).

4  
5 4.4 Respondent has met its burden of proving that Appellant neglected her duty when she  
6 attended a portion of the conference under the influence of drugs and alcohol, and then left her  
7 assigned work site (the conference) early to continue drinking alcohol and smoking marijuana.

8  
9 4.5 Inefficiency is the utilization of time and resources in an unproductive manner, the  
10 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of  
11 effective operations as measured by a comparison of production with use of resources, using some  
12 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*  
13 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

14  
15 4.6 Appellant had a duty to attend the scheduled training provided by her agency during the  
16 conference. Respondent has met its burden of proving that Appellant's behavior constituted  
17 inefficiency when she failed to demonstrate appropriate use of state resources and efficient use of  
18 her work time between 8:00 a.m. and 5:00 p.m. on that day.

19  
20 4.7 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to  
21 do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with  
22 the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-  
23 135 (1995).



1 4.8 Possession and use of marijuana is illegal in the State of Washington. Appellant admitted  
2 that she purchased and brought marijuana to the conference with her. Respondent has met its  
3 burden of proving that Appellant's behavior constituted malfeasance.

4  
5 4.9 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
7 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
8 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

9  
10 4.10 Respondent has met its burden of proving that Appellant's behavior constituted gross  
11 misconduct when her use of alcohol and drugs disrupted the conference. Further, Appellant's  
12 behavior interfered with her co-workers' ability to focus on the conference because they were  
13 distracted by her intoxicated condition and tried to assist her.

14  
15 4.11 Willful violation of published employing agency or institution or Personnel Resources  
16 Board rules or regulations is established by facts showing the existence and publication of the rules  
17 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
18 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

19  
20 4.12 Respondent has proven that Appellant had knowledge of the agency's Alcohol and Drug  
21 Free Workplace Policy 550 and Standards for Ethical Conduct for Employees Policy 6.04.  
22 Respondent has met its burden of proof that Appellant violated both policies on October 11, 2001.

23  
24 4.13 In determining whether a sanction imposed is appropriate, consideration must be given to  
25 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
26 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to

1 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
2 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

3  
4 4.14 Although it is not appropriate to initiate discipline based on prior formal and informal  
5 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
6 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
7 D93-163 (1995).

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9 4.15 In light of Appellant's egregious and unacceptable behavior, Respondent has established  
10 that the disciplinary sanction of dismissal was not too severe and was appropriate under the  
11 circumstances presented here. Therefore, the appeal should be denied.

12  
13 **V. ORDER**

14 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Teresa Fox is denied.

15  
16 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

17  
18 WASHINGTON STATE PERSONNEL APPEALS BOARD

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20 \_\_\_\_\_  
21 Walter T. Hubbard, Chair

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23 \_\_\_\_\_  
24 Gerald L. Morgen, Vice Chair

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26 \_\_\_\_\_  
Busse Nutley, Member